

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

Randy S. Saunders, Appellant,

v.

Department of the Interior, Agency.

Docket Number AT1221920927-W-1

Date: March 26, 1993

Ronald K. Thompson, Savannah, Georgia, for the appellant.

John H. Harrington, Atlanta, Georgia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued November 23, 1992, that dismissed his appeal as settled. For the reasons discussed below, we DISMISS the petition for review as untimely filed.

BACKGROUND

The appellant filed an individual right of action (IRA) appeal alleging that he was terminated from employment during his probationary period in reprisal for certain whistleblowing disclosures. During the hearing in that appeal, the parties entered into a settlement agreement, which they read into the record. The administrative judge found that the agreement was lawful on its face, that it was freely reached, and that the parties understood its terms. Further finding that the settlement resolved an appeal over which the Board has jurisdiction, the administrative judge entered the agreement into the record for enforcement purposes, and dismissed the appeal.

On January 19, 1993, the appellant's attorney mailed a letter to the administrative judge requesting that the settlement agreement be rescinded and

the hearing reconvened.¹ According to Mr. Thompson, the agency stated at the hearing that the Carolina Sandhills Refuge was going to be closed or sold to the State of South Carolina, and that it had made an effort to find a position for the appellant. He said the appellant learned on November 23, 1992, however, that Carolina Sandhills Refuge was not going to be closed or sold, and that a Forester position had been filled there within the preceding month. Mr. Thompson contended that, "Based on these incorrect statements, Mr. Saunders is convinced that he has been 'blackballed' by the Agency and that the Agency has no intention to comply with the agreement it entered into."

The Atlanta Regional Office forwarded Mr. Thompson's letter to the Clerk of the Board, which advised Mr. Thompson that, because an initial decision had been issued, correspondence should now be directed to the Clerk.² The notice further advised that the letter, which was being considered as a petition for review, was untimely filed, and informed Mr. Thompson that the Board may dismiss the petition unless he provided an affidavit or declaration made under penalty of perjury establishing good cause for the delay in filing. Mr. Thompson responded in a declaration made under penalty of perjury, which essentially repeated the allegations made in the earlier letter.

ANALYSIS

A petition for review must be filed within 35 days after the issuance of the initial decision. 5 C.F.R. § 1201.114(d). The Board will waive this time limit only upon a showing of good cause for the delay in filing. 5 C.F.R. § 1201.12, 1201.114(f). To establish good cause for an untimely filing, a party must show that he exercised diligence or ordinary prudence under the particular

¹ Mr. Thompson asked in the alternative for a Board order "finding that the appeal is not a remedy which he is required to exhaust before proceeding to District Court." An appellant may appeal a final Board decision to the U.S. Court of Appeals for the Federal Circuit. See 5 U.S.C. § 7703. In "mixed" cases involving allegations of unlawful employment discrimination, an appellant may file an action in U.S. district court following the Board's final decision. See 5 U.S.C. § 7702; 5 C.F.R. § 1201.157. The instant appeal is not a mixed case in which the appellant may file in district court; his only recourse is an appeal to the Court of Appeals for the Federal Circuit.

² After issuing an initial decision, an administrative judge retains jurisdiction over a case only to the extent necessary to: Correct the transcript, when one is obtained; rule on motions for exceptions to the requirement that a party seeking a transcript must pay for it; rule on a request by the appellant for attorney fees; and to process a petition for enforcement. 5 C.F.R. § 1201.112. As we discuss below, *infra* at note 4, Mr. Thompson's letter does not allege a violation of the settlement agreement, and therefore could not be processed as a petition for enforcement.

circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

The initial decision informed the appellant that, if he believed that the settlement agreement was unlawful, involuntary, or was the result of fraud or mutual mistake, he could request Board review by filing a petition for review. Initial Decision at 3. It further informed him that the initial decision would become final on December 28, 1992, unless a petition for review was filed by that date. *Id.* at 2. According to his attorney's submissions on review, the appellant became aware of the agency's alleged misrepresentations on November 23, 1992, the same day the initial decision was issued, and just four days after the settlement agreement was reached. He then delayed for eight weeks, three weeks beyond the deadline for filing a petition for review, before bringing the matter to the Board's attention.³ Under these circumstances, we find that the appellant failed to exercise the diligence or ordinary prudence required to establish good cause for his delay in filing.⁴ See *Alonzo*, 4 M.S.P.R. at 184; *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981) (the appellant is responsible for the errors of his chosen representative).

ORDER

This is the final order of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision will remain the final decision of the Board with regard to all other matters relating to the appeal. 5 C.F.R. § 1201.113.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

³ The appellant's attorney stated that he attempted to reach an amiable resolution of the matter during this period, but was unable to reach any conclusions in the midst of the Thanksgiving and Christmas holidays.

⁴ We note that the settlement agreement made no reference to the Carolina Sandhills Refuge or to any obligation on the agency's part to consider the appellant for any job vacancies. See Hearing Tape, Side A. We therefore do not forward the appeal to the regional office for consideration as a petition for enforcement.

717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.